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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 686.

THE EXPORT AND IMPORT LUMBER COMPANY,
PLAINTIFF IN ERROR,

against

THE PORT BANGA LUMBER COMPANY, LIMITED,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

I.

Now comes the defendant in error, the Port Banga Lumber Company, Limited, by his attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that this court has no jurisdiction thereof, neither the Con-

stitution or any statute, treaty, title, right, or privilege of the United States being involved, and the value in controversy being less than $25,000.

Second. To affirm the judgment of the Supreme Court of the Philippine Islands on the ground that it is manifest that this writ of error was taken for delay only, and that it is apparent that the questions raised in the assignment of errors were frivolous for the purposes of an appeal to this court, in that such questions are exclusively within the jurisdiction of the Supreme Court of the Philippine Islands to finally determine.

Third. To transfer this cause for hearing to the summary docket if this court should refuse to dismiss or to affirm, because the cause is of such a character as not to justify extended argument.

CLEMENT L. BOUVÉ,
JAMES ROSS,
Attorneys of Record for Defendant in Error.

Notice of Motion.

The plaintiff in error is hereby notified that the defendant in error will, on the 15th day of March, A. D. 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as the hearing may be had, submit for the consideration of the said court the foregoing motions, and each of them, and the brief in support thereof hereto attached, including portions of the record and of the Organic Act of the Philippine Islands as contained in an appendix thereof, all of which are now served upon you herewith.

CLEMENT L. BOUVÉ,
JAMES ROSS,
Attorneys of Record for Defendant in Error.

Received a copy of the foregoing notice, brief, and appendix thereto attached this — day of January, A. D. 1915.

(Signed) ALLISON D. GIBBS,
Attorney of Record for Plaintiff in Error.

II.

Facts.

This is an action brought by the Port Banga Lumber Company (here the defendant in error) against the Export and Import Lumber Company (here the plaintiff in error) for the purpose of annulling a written contract obtained by fraud, the design of the defrauder in obtaining the execution of the written contract obviously being to bring about a surrender, by the party defrauded, of rights based on a preceding oral agreement dealing with the same subject-matter, and for a recovery from the defrauder based on rights acquired under the oral agreement in question. The party bringing the action sues for a sum amounting, roughly, to P35,000, or $17,500, U. S. currency. The party sued answers with a counter-claim for P17,500, or $8,750, U. S. currency, being the difference between the amount actually contracted for by the defrauder, the Export and Import Company, with the China Import and Export Lumber Company and the amount actually received by the Export and Import Company from the China Company.

Both the Court of First Instance and the Supreme Court find that the venture is a joint venture, and that the Port Banga Company and the Import and Export Company are entitled to equal shares in profits actually received in the course of such venture after the deduction of expenses proved to have been incurred. The Court of First Instance refuses to concede the counter-claim at all and renders judgment in favor of the plaintiff below in the sum of P35,140.23, or $17,570.115, U. S. currency. The Supreme Court on appeal finds that the P17,500 item does not represent a counter-claim, but simply represents a portion of the contract price which the parties to the joint enterprise failed to receive, and is a loss in which they must therefore share equally. The amount adjudicated to the Port Banga Company by the

Court of First Instance is therefore reduced by one-half that sum, to wit, P8,750, final judgment being rendered against the Export and Import Company in the sum of P26,390.23, or $13,195.115, U. S. currency.

III.

Points and Authorities.

A. On the face of the record the amount in dispute is insufficient to give this court jurisdiction.

The act of Congress of July 1, 1902 (the Organic act of the Philippine Islands) provides, in its 10th section:

> "That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States." Sec. 10 of the act of Congress of July 1, 1902.

B. Where the jurisdiction of this court depends upon the amount in controversy, the value giving jurisdiction must be established by a preponderance of evidence.

Enriquez against Enriquez, 222 U. S., 123 and
Same against Same, 222 U. S., 127.

IV.

Argument.

Nowhere does it appear in the record that the amount in controversy even approximates the sum of P50,000, or $25,000 United States currency, necessary to give this court jurisdiction under the act of Congress of July 1, 1902. Nor does the assignment of errors or the petition for the allowance of an appeal suggest the existence of a sufficient amount or any other jurisdictional ground.

What does appear is that such petition was at first denied, apparently, on the ground that the petitioner admitted at the time that he had no justification in law for submitting the petition. (See Appendix, page 27) The record contains no order or resolution of the court disallowing the appeal in the first place; nor, in the order ultimately allowing it, is any reason assigned for the court's change of attitude. This is left a matter of conjecture, since not even any colorable specific ground for appeal appears on the face of the record. Is not this fact sufficient to indicate, *prima facie*, that the writ was sued out for purposes of delay only?

In view of the apparent absence of any jurisdictional ground whatsoever, counsel present may be excused for stating that he has been informed by his correspondents in Manila that the appeal was taken on the theory that the jurisdictional requirement as to amount is met by tacking to the claim of P36,000, made by the Port Banga Company, the counter-claim of P17,500, made by the Export and Import Company, the two together amounting to P53,000, or an amount exceeding $25,000 United States currency. If this is the ground on which the writ is based—and the record reveals no other—its frivolous character can hardly be denied. If anything, the effect of a counter-claim duly established would be to lessen rather than increase the amount in controversy.

V.

Appendix.

Pursuant to the rules and practices of the court, and for the purposes of these motions only, defendant in error has caused to be printed the amended complaint of the Port Banga Lumber Company, here the defendant in error; so much of the answer thereto as defines the counter-claim presented by the plaintiff in error; the stipulation between counsel for the Port Banga Company, plaintiff, and the Export and Import Company, defendant, in the action brought before the Court of First Instance for the Moro Province, referred to by Mr. Justice Carson in the modified decision of the Supreme Court of the Philippine Islands; the findings of fact and adjudication concluding the decision of the Court of First Instance of the Moro Province against the Export and Import Lumber Company; extracts from the decision of the Supreme Court of the Philippines, of February 6, 1914; extracts from the modifying decision of that court of March 27, 1914; the final judgment rendered; the petition for an appeal of April 8, 1914; the petition to file an amended assignment of errors; the order allowing the appeal, and the amended assignment of errors. No original assignment of errors appears of record. Those parts of the record not essential to the consideration of the motion are omitted.

A. Amended Complaint.

Fourteenth Judicial District.

THE UNITED STATES OF AMERICA,
Philippine Islands, Moro Province:

In the Court of First Instance of the District of Zamboanga.

Civil Case No. 275.

PORT BANGA LUMBER COMPANY, *Plaintiff,*
versus
EXPORT AND IMPORT LUMBER COMPANY, *Defendant.*

Annulment of Contract and Damages.

Amended Complaint.

Now comes the above-named plaintiff by its attorneys Yeager and Gibbens, and, leave of court first having been obtained, presents this amended petition and as cause of action against above-named defendant states:

1. The plaintiff and defendant are corporations duly organized and existing according to the laws of the Philippine Islands for the purpose of engaging in commerce therein, and the principal office of the plaintiff in (*sic*) in Zamboanga, Moro Province, P. I., and that of defendant in Manila, P. I.

2. That on or about March or April of 1910 the plaintiff, through F. P. Williamson, its vice-president, and the defendant, through W. W. Payne, its president, made and entered into an oral contract whereby the said parties, plaintiff and defendant, should make and execute a contract to supply an order of pagatpat logs to certain parties in China, which contract should be carried out upon a joint account

basis—that is, after each party thereto had deducted its respective expenses the profits should be equally divided and the defendant herein named should obtain said contract and the plaintiff herein should furnish the logs to fulfill same.

3. And on or about the 6th day of May, 1910, there was made and executed between the Export and Import Lumber Company, defendant herein, and the said China Import and Export Lumber Company, Limited, a contract for the sale of forty thousand (40,000) cubic feet, more or less, of pagatpat logs of various lengths and dimensions by defendant herein to said China Import and Export Lumber Company, Limited, at the price of ninety (90) cents, U. S. currency, or one peso and eighty centavos, Conant (P1.80) per cubic foot, a copy of which contract is hereto attached, marked Exhibit "A," and forms an integral part of this petition.

4. That subsequent to the execution of the contract marked Exhibit "A" between defendant herein and the China Import and Export Lumber Company, Limited, said W. W. Payne, president of the defendant herein, repeatedly, falsely and fraudulently represented and stated to plaintiff herein and to the officers of the said plaintiff company that the defendant herein had signed and executed the aforesaid contract, marked Exhibit "A," but that the best price which could be obtained was fifty-five (55) centavos, Conant, per cubic foot; that he, the said W. W. Payne, had spent large sums of money while in China and in entertaining the representative of the China Import and Export Lumber Company, Limited, while said representative was in Manila; that said moneys had been expended for the purpose of obtaining the execution of the contract marked Exhibit "A"; that he, said Payne, had no record or account of said expenditures; that if the contract set out in paragraph 2 of this petition, providing for the fulfillment of the contract marked Exhibit "A," should be carried out upon the basis of the joint account as previously agreed, that he, said Payne, could furnish no record or account of said expenditures, and

the presentation of an account of several thousand pesos would make it appear that he was defrauding plaintiff herein; but that if a contract should be signed and executed by and between plaintiff and defendant herein providing for the sale of the aforesaid forty thousand (40,000) cubic feet of pagatpat logs by plaintiff to defendant at the price of forty (40) centavos, Conant, per cubic foot, in view of the price of fifty-five (55) centavos, Conant, per cubic foot obtained by defendant from the China Import and Export Lumber Company, Limited, and in view of other facts set out in this paragraph, then, and for those reasons, the stated price of forty (40) centavos per cubic foot to plaintiff company and the balance of fifteen (15) centavos per cubic foot to defendant company would be a just partition of the profits to be obtained and would be approximately the same thing as the joint account basis aforesaid.

5. That each and every one of the statements and representations set out in paragraph 4 and made by W. W. Payne, president of the defendant herein, were false and fraudulent, and were known to be false and fraudulent to the said W. W. Payne, president, and each and every one of said statements and representations was made with the purpose and intention of deceiving and defrauding the plaintiff herein and for the further purpose of inducing the plaintiff herein to consent to the annulment of the oral agreement set out in paragraph 2 hereof, and to sign and execute a contract of sale of the aforesaid forty thousand (40,000) cubic feet of pagatpat logs to the defendant herein at the price of forty (40) centavos, Conant, per cubic foot.

6. That by reason of the said false and fraudulent statements of W. W. Payne, president of the defendant company, the plaintiff herein was deceived and defrauded and induced to sign and execute, and on June 10, 1910, did sign and execute a contract of sale of the said forty thousand (40,000) cubic feet of pagatpat logs to the defendant herein at the rate and price of forty (40) centavos, Conant, per cubic

foot, copy of which contract is hereto attached, marked Exhibit "B," and forms an integral part of this petition.

7. That during the months of October and November the plaintiff herein delivered to defendant herein, and defendant accepted for delivery to said China Import and Export Lumber Company, Limited, the amount of thirty-two thousand and thirty-two (32,032) cubic feet of pagatpat logs, and the defendant herein immediately delivered the aforesaid logs to and the same were accepted and paid for by the China Import and Export Lumber Company, Limited, the logs having been loaded on a steamer at the mill of the plaintiff herein.

8. That subsequent to the aforesaid delivery to and acceptance by the China Import and Export Lumber Company, Limited, of the said thirty-two thousand and thirty-two (32,032) cubic feet of pagatpat logs the plaintiff herein accidentally learned that the defendant herein was receiving ninety (90) cents, U. S. currency, per cubic foot, and not fifty-five (55) centavos, Conant, as had been falsely and fraudulently stated and represented by defendant herein.

9. That plaintiff herein has repeatedly demanded of defendant the fulfillment of the contract between plaintiff and defendant as said contract is set out in paragraph 2 hereof and defendant has refused and continues to refuse to fulfill and comply with the said contract and has refused and still refuses to settle with the plaintiff herein for the aforesaid thirty-two thousand and thirty-two (32,032) cubic feet of logs.

10. That in cutting, hauling, trimming, and preparing the logs and timbers set out in contract marked Exhibit "B" and in otherwise fulfilling said contract marked Exhibit "B," the plaintiff herein has expended the sum of fourteen thousand, six hundred and twenty-two pesos and eighty-six centavos (P14,622.86), Philippine currency, and copy of expenditures so made is hereto attached marked Exhibit "C" and forms an integral part hereof.

11. That, for the reasons set out in this amended petition, the defendant herein is indebted to plaintiff herein in the sum of thirty-six thousand and forty pesos and twenty-three centavos (P36,040.23), Philippine currency, that is to say, one-half of the sum obtained by deducting fourteen thousand, four hundred and twenty-two pesos and eighty-six centavos (P14,422.86), Philippine currency, the value of said thirty-two thousand and thirty-two (32,032) cubic feet of logs at one peso and eighty centavos (P1.80) Philippine currency, or twenty-one thousand, six hundred and seventeen pesos and thirty-seven centavos (P21,617.37) Philippine currency, plus the sum of fourteen thousand, four hundred and twenty-two pesos and eighty- six centavos (P14,422.86) Philippine currency, expended as aforesaid by plaintiff herein.

Wherefore plaintiff prays:

1. That the contract between plaintiff and defendant herein which contract is marked Exhibit "B" be declared null and void;

2. That the prior contract as set out in paragraph 2 hereof be declared to be in full force and effect;

3. That judgment be rendered in favor of plaintiff and against defendant in the sum of thirty-six thousand and forty pesos and twenty-three centavos (P36,040.23) Philippine currency, with costs of suit;

4. For any other remedy or redress provided by law.

Zamboanga, Moro Province, P. I., February 25, 1911.

(Signed) YEAGER AND GIBBENS,

Attorneys for the Port Banga Company, Limited.

B. Answer to Amended Complaint.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Court of First Instance of the Moro Province, Fourteenth Judicial District.

Cause No. 275.

PORT BANGA LUMBER CO., *Plaintiff,*
versus
EXPORT AND IMPORT LUMBER CO., *Defendant.*

Amended Answer (Answer to Amended Complaint).

Comes now the defendant company by its attorneys, A. D. Gibbs and Chas. A. McDonough, and answering the amended complaint:

1st. Denies each and every allegation of said amended complaint which is not hereinafter specifically admitted.

2nd. That the only contract entered into between the parties with reference to the cargo of logs—the subject of this action—is the written contract of June 10th, 1910, a copy of which marked Exhibit "1" for identification is attached hereto and made a part of this answer.

3rd. That on or about the 26th day of August, 1910, the plaintiff received and accepted from the defendant company P5,000.00 on account of said contract of June 10, 1910, and has ever since retained, and still retains the same; by reason whereof plaintiff has ratified said contract, has waived any and all objections thereto, and is estopped from demanding the rescission thereof.

Counter-claim.

As a counter-claim against the plaintiff company, the defendant company alleges:

* * * * * * *

(*f*) That due to the noncompliance with its contract on the part of the plaintiff in the supplying and delivering of said cargo, the China Import and Export Lumber Company, refused to pay to the defendant company the price agreed upon in its said contract and the latter in order to settle its account and compromise the case with the China Import and Export Lumber Company was forced to deduct and did deduct from the contract price of said cargo the sum of $8,750 U. S. currency; all of which appears in an agreement of compromise a copy of which marked Exhibit "3" is attached hereto and made a part of this counter-claim. That said China Import and Export Lumber Company actually suffered damages equal to or in excess of such deduction by reason of the non-fulfillment of said contract by the plaintiff company.

(*g*) That due to the non-fulfillment by the plaintiff of its said contract with the defendant, the latter has suffered damages in the sum of $8,750, U. S. currency, equal to P17,500, Philippine currency.

Wherefore the defendant company prays that judgment be rendered relieving it from all liability on account of the complaint and that judgment be rendered in favor of defendant on its counter-claim against the plaintiff for the sum of P17,500, with costs of suit, and for such other and further relief as may be just and equitable.

Manila, P. I., July 31, 1911.

(Signed) A. D. GIBBS,
CHAS. A. McDONOUGH,
Attorneys for Defendant.

C. Stipulation of Counsel as to Deduction of P17,500.

(YEAGER:) By special agreement of counsel made in open court, it is admitted that the defendant company, the Export and Import Lumber Company, Limited, of Manila, received from the China Export and Import Lumber Company, Limited, of Shanghai, the full contract price for the cargo of pagatpat logs in question, of P1.80 per cubic foot, as fixed in the contract between the defendant company and the China Export and Import Lumber Company, Limited (this contract is marked Plaintiff's Exhibit "A"), less the amount of $8,750, gold—that is to say, P17,500, which was deducted from that contract price in pursuance of an agreement between the defendant company and the China Export and Import Lumber Company, Limited."

D. Concluding Paragraph of the Decision of the Court of First Instance of the District of Zamboanga.

The court finds the following facts proven by a very great preponderance of evidence: First, that the oral joint account agreement was made as alleged; that the second or written contract, marked Exhibit "B," was procured to be made by the plaintiff by means of the fraud of the defendant; that the plaintiff furnished 32,032 cubic feet of logs on the joint account agreement; that the plaintiff's expenses in furnishing the logs amounted to P14,422.86; that there is no evidence showing what the expenses of the defendant were; that the contract price for the logs to the China Export and Import Lumber Company was P1.80 per cubic foot or P57,657.60, and that after deducting the sum of P14,422.86 for the expenses of the plaintiff company the net profit of the transaction was P43,234.74, one-half of which, to wit, P21,617.37, together with P14,422.86, expenses, amounting in all to P36,040.23, is justly due from the defendant company to the plaintiff company, less P900 which the plaintiff

company received from the China company in payment for certain logs shipped.

Judgment is therefore rendered in conformity with the foregoing findings of fact and conclusions of law, setting aside the contract, marked Plaintiff's Exhibit "B," as null and void on account of fraud and that the plaintiff has judgment on the oral joint account agreement for the sum of P35,140.23, with legal interest thereon from the date of commencement of this action, and for the costs.

It is so ordered.

Zamboanga, Moro Province, P. I., January 27, 1912.

(Signed) CHAS. A. LOW,
Judge Court of First Instance,
14th Judicial District.

E. Decision of the Supreme Court of the Philippines of February 6, 1914.

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 7967.

PORT BANGA LUMBER COMPANY, *Plaintiff and Appellee,*
vs.
EXPORT AND IMPORT LUMBER COMPANY, *Defendant and Appellant.*

Submitted January 12, 1914; Decision Promulgated February 6, 1914.

Decision.

CARSON, *J.:*

The facts in this case, as disclosed by the evidence and found by the trial judge, are substantially as follows:

The plaintiff company was the owner of a saw mill, and logging plant near Port Banga, Mindanao, and the defendant company was engaged in the lumber trade in the city of Manila. The two companies had been doing business together for some time, having had dealings with each other aggregating upwards of P100,000. They were on the most cordial terms, and no formal written agreements were ever made between them, their business being transacted orally or by exchange of letters or telegrams, the relations of the two companies finally becoming so intimate that a consolidation of their interests was under consideration. Such were the conditions when, in December, 1909, Mr. F. P. Williamson, the vice-president of the plaintiff company, and Mr. W. W. Payne, the president of the defendant company, met at Manila and discussed the terms and conditions of a lumber contract which Payne believed he could secure in China on a profitable basis. The order that Payne had in view was a very important one, being for a special grade and size of Pagatpat logs, destined for use in the construction of the mausoleum of the late Emperor Kwang Hsu of China. The matter of available woods was discussed, the conversation culminating in an arrangement to "do the business together." In March, 1910, Messrs. Williamson and Payne again met at the office of the defendant company in Manila, Payne having just returned from China, where he had gone for the purpose of securing the contract which has formerly been discussed.

At this meeting Payne produced a telegram from parties in China calling for logs of certain large dimensions, which he stated could be somewhat reduced. The matter was then discussed in detail, Payne proposing that he would secure the order if the plaintiff company would furnish the logs, and holding out as an inducement that if this contract could be secured and filled other valuable contracts would follow. The former conversation in which it had been tentatively arranged "to do the business together" was referred to, and

the interview terminated in a definite and clear-cut oral agreement to undertake the business on "joint account," the defendant company to obtain the contract, secure the best possible price and arrange for financial assistance, while the plaintiff was to furnish the logs through its Mindanao plant. Williamson returned to Zamboanga, and his company at once commenced the preliminary work of locating and getting out the timber. Payne was successful in securing the China order, and on May 6 executed in the name of his company a contract with the China Import and Export Lumber Company, Limited (Exhibit "A"), whereby he agreed to furnish to the said China Company about 40,000 cubic feet of pagatpat logs of certain specified dimensions and in accordance with other conditions set forth in the contract, at the price of 90 cents, United States gold, or P1.80 Philippine currency per cubic foot. Very soon after the execution of this contract with the China Company—about the middle or end of May—Payne went to Zamboanga and at once began machinations by means of which he succeeded in inducing the plaintiff company to modify the original joint account agreement and enter into a much less advantageous contract, which is attached to the present record marked Exhibit "B." He began by suggesting a written agreement, something theretofore unheard of in the dealings between the two companies, giving as his reason for desiring a contract in writing "the China people had required him to sign." Payne grossly misrepresented the facts as to the terms of the contract with the China Company, and repeatedly assured the officers of the plaintiff company that he had been unable to secure a better price for the logs than 55 centavos per cubic foot. Several conversations were had upon this subject between Payne and the representatives of the plaintiff company in which the original joint account agreement was repeatedly referred to and Payne's false statements as to the price obtained by him from the China Company many times reiterated, until

finally the representatives of the plaintiff company, relying upon Payne's false and fraudulent representations consented to the proposed modification, which was subsequently reduced to writing in the form of a contract of purchase and sale dated June 10, 1910 (Exhibit "B"). The plaintiff company proceeded in good faith to carry out the contract, cut and transported the logs to tide-water at the point agreed upon, and, upon the arrival of the steamer chartered by the China Company, entered immediately upon the work with a sufficient force of laborers and adequate equipment, but was seriously hindered and delayed by the defective tackle and equipment carried by the ship. The loading was, however, finally completed, the cargo delivered to its consignee in China, and the agreed price, less certain deductions, paid to the defendant company. The contract lacked but little of completion—was, indeed, practically completed—when Williamson, in the course of a conversation with Mr. Seitz, the representative of the China Company, became cognizant of the fraud that had been practiced upon him by Payne. He at once taxed Payne with his deceit, and gave notice of his intention to rescind the fraudulently obtained contract, but permitted the few remaining logs to be placed upon the steamship, and immediately caused this action to be brought, the complaint having been filed in the Court of First Instance of the Moro province on November 14, 1910, the day on which the loading of the steamer was completed—this being the day upon which the alleged fraud was discovered. Payne's only reply to Williamson's charges of fraud and demand for redress was "that he stood upon the written contract."

The trial judge upon this finding of facts. rendered judgment in favor of the plaintiff company for the sum of P35,140.23, that being the balance due it, as found by him, after annulling the written contract, and allowing it a half share in the net profits of the enterprise.

The principal questions, and, as we think, practically the only questions raised by this appeal, are questions of fact.

Does the evidence sustain the finding of the trial judge that Payne and Williamson had an oral agreement or understanding that their respective companies would undertake on joint account to procure and to fill the contract for the delivery of certain lumber; that, thereafter, Payne, having secured the contract, grossly deceived Williamson as to the terms and conditions under which he secured the contract, and led him to believe that the price to be paid for the lumber under the contract was fifty-five centavos per cubic foot, when the fact was that the price was ninety cents, or P1.80; that by means of these false statements and misrepresentations of fact Payne induced Williamson to execute a written contract whereby he expressly obligated his company to perform its part of the joint undertaking for a fixed price much less than that which it would be entitled to receive under the agreement to secure and fill the contract for "joint account," and that the plaintiff company did in fact deliver the lumber in substantial compliance with the terms of the written contract and at the same time in substantially the manner and form contemplated in the original oral agreement touching the procurement and filling of the lumber contract on joint account.

These findings are all supported by the clear, definite, and unequivocal testimony of the witnesses called by the plaintiff, and although a formal contradiction by the manager of the defendant company was read into the record by consent of counsel, we find nothing therein which would justify us in disturbing the conclusions of fact as found by the trial judge who saw and heard the witnesses testify. * * *

Accepting the facts thus found, it needs no extended discussion of the law or the facts to sustain the rulings of the trial judge whereby he declined to permit the defendant company to "stand on the written contract" and thus profit by an agreement which the plaintiff company was induced to execute by the false and fraudulent misrepresentation of

material and controlling facts by the agents of the defendant company. It is sufficient to say that the question here involved is not the annulment or rescission of a simple contract of purchase and sale on the ground of concealment or misrepresentation by one of the parties of facts touching the anticipated profits or the purposes or objects inducing such party to execute the contract. * * * In making false and misleading statements as to the terms of the contract with the Chinese company as to the prices secured thereunder and as to the prospective profits to be anticipated therefrom, the manager of the defendant company was seeking not merely to induce the manager of the plaintiff company to execute a contract of purchase and sale at the lowest possible price, but to induce him at the same time to forego any rights which he might have acquired under the oral agreement to secure and fill the contract on joint account, and to induce him to accept, in lieu of a half share in the profits, a price per foot for the lumber, a price much less than that to which he would be entitled under the oral agreement. * * *

The judgment entered by the trial court should therefore be and is hereby affirmed, with the costs of this instance against the appellant.

It is so ordered.

(Signed) A. C. CARSON.

We conform:

(S'g'd) C. S. ARELLANO,
Chief Justice.

GRANT T. TRENT,
MANUEL ARAULLO,
Associate Justices.

I do not conform:

(S'g'd) SHERMAN MORELAND,
Associate Judge.

F. Decision of Supreme Court of the Philippines of March 27, 1914.

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 7967.

PORT BANGA LUMBER COMPANY, Plaintiff and Appellee,

vs.

EXPORT AND IMPORT LUMBER COMPANY, *Defendant and Appellant.*

Motion for a New Trial. Decision Promulgated Feb. 6, 1914. March 27, 1914.

Decision.

CARSON, *J.:*

Upon due consideration of written briefs of counsel we are of opinion that our decision in this case directing the entry of judgment affirming the judgment of the court below should be modified by reducing the amount of the judgment entered in the court below by the sum of P8750, being one-half the amount which "by special agreement of counsel made in open court it is admitted" was deducted from the full contract price "in pursuance of an agreement between the defendant company and the China Export and Import Company, Ltd."

We think that it is perfectly clear that upon appellee's general theory of the transaction, which was upheld in our decision, it was error on the part of the trial judge to base his calculation of the net profits of the transaction upon an assumption that the amount of the gross profits was the contract price for the logs actually delivered. The amount actually received was P17,500 less than the contract price,

as appears from the stipulation of counsel set forth at page 95 of the stenographic notes. N. B.—In the absence of evidence tending to disclose that this deduction was made fraudulently or with purpose to secure an unfair advantage by one of the parties to the joint undertaking, we think that the estimate of net profits by the trial judge must be corrected in this regard. * * *

The petition of appellant for a rehearing and a new trial is denied, but the decision heretofore filed in this case is hereby amended so as to direct the modification of the judgment entered in the court below by reducing the amount thereof by the sum of P8,750 and affirming the judgment thus modified, with costs against the appellant.

It is so ordered.

(S'g'd) A. C. CARSON.

We conform:

(S'g'd) C. S. ARELLANO, *Ch. J.*
GRANT T. TRENT,
MANUEL ARAULLO,
Associate Judges.

NOTE.—This stipulation, appearing on page 246 of the record as paged in the copy docketed in this court, is set out in full in this appendix.

G. Judgment.

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

File No. 7967.

PORT BANGA LUMBER COMPANY, *Plaintiff and Appellee,*
versus
EXPORT AND IMPORT LUMBER COMPANY, *Defendant and Appellant.*

Judgment.

APRIL 3, 1914.

The court having regularly acquired jurisdiction for the trial of the above-entitled cause submitted by both parties for decision, after consideration thereof by the court upon the record, its decision and order for judgment having been filed on the sixth day of February, A. D. nineteen hundred and fourteen, and March 27, 1914.

By virtue thereof it is hereby adjudged and decreed that the judgment of the Court of First Instance of Zamboanga, dated the 27th day of January, nineteen hundred and twelve, and from which the above-entitled appeal was taken, be, and the same is hereby modified, reducing the amount thereof by the sum of P8,750 and affirming same in all other parts, with the cost of this instance against the appellant.

It is further ordered that the plaintiff recover from the defendant the sum of P40.00, as costs.

(Sgd.) V. ALBERT,
[COURT SEAL.] *Clerk of the Supreme Court of the Philippine Ieslands.*

MANILA, P. I., September 8, 1914.

I certify that the foregoing is a true and correct copy of its original on file in my office.

(Sgd.) V. ALBERT,
Clerk Supreme Court, P. I.

H. Petition for an Appeal.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

No. 7967.

PORT BANGA LUMBER COMPANY, *Plaintiff and Appellee,*
v.
EXPORT AND IMPORT LUMBER COMPANY, *Defendant and Appellant.*

Petition for an Appeal.

The above-named defendant, conceiving itself aggrieved by the judgment made and entered on the second day of April, nineteen hundred and fourteen in the above entitled cause, does hereby appeal from the said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Appellant further prays that the judgment be superseded upon the giving of a supersedeas bond in such sum as this court may fix.

Manila, P. I., April 8, 1914.

(Sgd.) GIBBS, McDONOUGH AND BLANCO,
Attorneys for Defendant and Appellant.

I. Petition to File Amended Assignment of Errors.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

R. G. No. 7967.

PORT BANGA LUMBER COMPANY, *Plaintiff and Appellee,*
v.
EXPORT AND IMPORT LUMBER COMPANY, *Defendant and Appellant.*

Petition to File Amended Assignment of Errors.

Comes now the defendant and appellant in the above-entitled cause and respectfully requests permission to file the attached amended assignment of errors in lieu of the original one heretofore filed with its petition and prayer for an appeal to the Supreme Court of the United States.

MANILA, P. I., May 28, 1914.

(S'g'd) GIBBS, McDONOUGH AND BLANCO,
Attorneys for Defendant and Appellant.

Permission prayed for above granted this fourteenth day of June, 1914, the petition having been submitted June 13, 1914.

BAGUIO, P. I., June 14, 1914.

[COURT SEAL.] A. C. CARSON,
Associate Justice, Supreme Court,
Philippine Islands.

J. Order Allowing the Appeal.

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 7967.

PORT BANGA LUMBER COMPANY, *Plaintiff and Appellee,*
v.
EXPORT AND IMPORT COMPANY, *Defendant and Appellant.*

(*Typewritten Copy of Original Allowance of Petition for Appeal, Written by Justice Carson.*)

The Clerk of the Supreme Court of the Philippine Islands:

Heretofore, to wit, on the 20th of April, 1914, a petition for a writ of error in the above-entitled cause was denied by the undersigned, counsel for the petitioner having intimated in the oral discussion had thereon that he was satisfied he was not entitled thereto.

Nevertheless, on full consideration of the petition of counsel for the defendant for the allowance of an appeal to the Supreme Court of the United States of America, dated the 8th day of April, 1914, it is ordered that an appeal to the Supreme Court of the United States from the final judgment and decree heretofore filed and entered herein, be, and the same is hereby allowed; and that a certified transcript of the record, testimony and all proceedings had herein be forthwith transmitted to the Supreme Court of the United States of America, upon the filing by the petitioner of a supersedeas bond in the sum of twenty thousand dollars U. S. currency, or if it is not desired that the filing of the bond have the effect of a supersedeas, upon the filing of a bond for the costs in the sum of five thousand dollars U. S. currency, the bond thus filed to be approved by the clerk of

the court, after giving opportunity to counsel for plaintiff to present objections, and to be approved by the undersigned should counsel for plaintiff insist upon his objections in writing.

Upon the filing and approval of a supersedeas bond so provided herein you will forthwith transmit a copy of this order to the court below, and at the same time direct the clerk of that court to return any portion of the record which may have been remanded to him.

BAGUIO, PHILIPPINE ISLANDS, May 13, 1914.

[SEAL OF COURT.]

(S'g'd) A. C. CARSON,
Associate Justice, Supreme Court,
Philippine Islands.

Received and filed in the clerk's office, May 16, 1914.

(S'g'd) V. ALBERT, *Clerk.*

K. Amended Assignment of Errors.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

R. G. No. 7967.

PORT BANGA LUMBER CO., *Plaintiff and Appellee,*
versus
EXPORT AND IMPORT LUMBER CO., *Defendant and Appellant.*

Amended Assignment of Errors.

The defendant prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:

1.

The Supreme Court of the Philippine Islands erred in affirming the decision of the trial court overruling defendant's demurrer to the amended complaint.

2.

The Supreme Court of the Philippine Islands erred in affirming the decision of the trial court overruling the objections of counsel for defendant to the evidence of an oral agreement preceding the execution of the written contract.

3.

The Supreme Court of the Philippine Islands erred in affirming the decision of the trial court finding that the parties entered into an oral joint account agreement previous to the execution of the written contract.

4.

The Supreme Court of the Philippine Islands erred in

affirming the decision of the trial court declaring null and void and rescinding the written contract of June 10th, and in reviving and declaring in full force and effect in its stead the alleged previous oral joint account agreement.

5.

The Supreme Court of the Philippine Islands erred in refusing to allow defendant's counter-claim for P17,500.

6.

Assuming the existence of the alleged joint account venture the Supreme Court of the Philippine Islands erred in allowing the alleged expenses of the plaintiff in connection therewith without ordering those of the defendant to be ascertained and allowed and in rendering any money judgment against the defendant without first returning the case to the Court of First Instance for a liquidation of accounts between the alleged partners.

7.

Assuming the existence of the alleged joint account venture the Supreme Court of the Philippine Islands erred in allowing the alleged expense and damages of the plaintiff in connection therewith (*a*) because the expenses incurred constituted the plaintiff's contribution of capital to the alleged joint account venture; (*b*) because a large portion of the alleged expenses were incurred in getting out logs which were not delivered under the alleged joint account contract, but were kept and disposed of by the plaintiff for its own use and benefit, and (*c*) because the alleged damages suffered by the plaintiff and included as expenses are remote and speculative and not chargeable in any event to the alleged joint account venture.

8.

Assuming the existence of the alleged joint account venture the Supreme Court of the Philippines erred in refusing

to make any allowance to the defendant for the P5,000 advanced to the plaintiff on account of the logs of the alleged joint enterprise.

9.

Assuming the existence of the alleged joint account venture the Supreme Court of the Philippines erred in refusing to make allowance to defendant for the expenses incurred by it in connection with the business of the alleged joint enterprise.

10.

Assuming the existence of the alleged joint account venture the Supreme Court of the Philippine Islands erred in making allowance to plaintiff as expenses for amny (*sic*) items which should not be charged to the account of the alleged joint enterprise.

11.

The Supreme Court of the Philippine Islands erred in rendering judgment in favor of the plaintiff and against the defendant.

Wherefore defendant and appellant prays that said decision, judgment and decree be reversed and judgment rendered in its favor with costs.

Manila, P. I., May 28, 1914.

GIBBS, McDONOUGH & BLANCO,
Attorneys for Defendant and Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1914

No. 686

THE EXPORT & IMPORT LUMBER COMPANY,
Appellant,

against

THE PORT BANGA LUMBER COMPANY, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS

Argument Against Motion to Dismiss (Writ of Error) Appeal

INTRODUCTORY STATEMENT

This is not a writ of error as erroneously assumed by Counsel for Appellee but an appeal.

In the absence of the undersigned, his partner as a precautionary measure presented simultaneously both a petition for a writ of error and for an appeal. When the application for the writ of error came on for hearing, the undersigned stated to Justice Carson that it was not a law case but an action in equity and was therefore not the subject of a writ of error. Hence the statement of Justice Carson in his

order allowing the appeal (Exhibit "J" p. 27 appellee's motion) to the effect that Counsel for Appellant intimated that he was satisfied, he was not entitled to the writ of error. Justice Carson therefore denied the writ of error and having heard Counsel for Appellant at a later date upon the petition for an appeal granted the same.

Statement of the Case

On the 14th day of November, 1910, the Port Banga Lumber Company, appellee herein, filed its original complaint to annul a written contract of sale, to supplant the same by an alleged previous oral joint account agreement and for an accounting which complaint was on February 25, 1911, amended, demanding judgment against the Export & Import Lumber Company, appellant herein, for the sum of Thirty-six thousand forty pesos (₱36,040.23) and twenty three cents as its share of the profits of the alleged joint account venture (pp. 1 and 2, and 9 to 18 incl. original typewritten record). On July 31st, 1911, appellant herein, filed an answer alleging that the only contract entered into between the parties with reference to the cargo of logs in controversy was a written contract of sale and denying any liability on account of the matters alleged in the complaint as amended, and presented at the same time a counterclaim against appellee for damages in the sum of ₱17,500.00 which appellant had been compelled to deduct from the price at

which it had contracted to sell the cargo of logs previous to its purchase from appellee, due to the failure of appellee to comply with its said contract of sale with appellant.

(See Exhibit "B" p. 13 Appellee's printed motion to dismiss.)

On January 12th, 1912, the Court of First Instance rendered judgment in favor of appellee and against appellant for the sum of ₱35,140.-23 with legal interest (6% per annum) from the commencement of the action (Nov. 14, 1910) and denied appellant's counterclaim.

(See original typewritten record pp. 117 to 130 incl.)

From the judgment of the Court of First Instance, appellant appealed to the Supreme Court of the Philippine Islands.

On January 12th, 1914, the Supreme Court of the Philippine Islands affirmed the judgment of the trial Court, Justice Sherman Moreland dissenting.

(pp. 350 to 358 original typewritten record.)

On March 27, 1914, the Supreme Court of the Philippines modified its previous decision by reducing the amount of the judgment of the lower Court by the sum of ₱8,750.00.

(Exhibit "F" p. 22, Appellee's motion to dismiss.)

On the 3rd of April, 1914, judgment was entered in accordance with the decision, as modified, of the Supreme Court of the Philippines.

(Exhibit "G" p. 24 Appellee's motion to dismiss.)

From the last mentioned judgment this appeal was allowed, appellant assigning as errors among others, the affirmance of the judgment of the trial Court as modified and the denial of appellant's counterclaim for ₱17,500.-00.

(See pp. 25 to 31, Appellee's motion to dismiss.)

The amount of the judgment of the Supreme Court of the Philippines in favor of appellee against appellant was ₱26,390.23 with interest at 6% from the date of appellee's original complaint November 14, 1910, to April 3, 1914, equivalent to ₱31,751.84 or $15,875.92 U. S. Currency.

The amount of appellant's counterclaim on the date of the judgment of the Supreme Court of the Philippines was ₱17,500.00 with interest at 6% from July 31, 1911, the date of presentation thereof in the Court of First Instance equivalent to ₱20,305.83 or $10,152.91 U. S. Currency.

The total amount in controversy on April 3, 1914, the date of the judgment appealed from was $26,028.83 U. S. Currency, as shown on the face of the pleadings and judgments of the Court of First Instance and of the Supreme Court of the Philippines.

Calculating interest on the counterclaim from the date of the judgment of the trial Court (Jan. 27, 1912) to the date of the judgment of the Supreme Court (April 3, 1914) as required by Sec. 510 of the Code of Civil Procedure of

the Philippines and eliminating the interest between the date of presentation and that of the judgment of the trial Court, the counterclaim amounted on the date of judgment of the Supreme Court of the Philippines to ₱19,-792.50 or $9,896.25 U. S. Currency, making the total amount in controversy on that date $25,772.17.

Argument

The statement of Counsel for appellee (p. 6 motion to dismiss) that "if anything, the effect of a counterclaim would be to lessen rather than increase the amount in controversy," discloses a lamentable ignorance of the pleadings and of the entire case.

Appellant entered into a written contract to deliver within a fixed period to a firm of lumber dealers in Shanghai, a cargo of logs of specified dimensions at a stipulated price per cubic foot and then sub-let the contract by written agreement upon precisely the same conditions except as to price to appellee.

After the cargo was delivered to the Shanghai firm aboard the ship supplied for that purpose and the contract had been fully executed, the appellee having learned that appellant was making more out of the transaction than it (appellee) was and desiring to repudiate the written contract of sale, filed its complaint alleging that previous to the execution of the written contract of sale the parties had an oral agreement that any orders for lumber which

might be secured by appellant in China should be filled by appellee on joint account and that appellee was induced to abandon the oral joint account agreement and to enter into the contract of sale through the fraudulent misrepresentations of appellant's representative as to the price he was receiving from the Shanghai firm.

Appellant answered denying the alleged oral joint account agreement and insisting, that the only agreement existing between the parties was the written contract of sale. This answer was accompanied by a counterclaim in which appellant alleged that appellee failed to fulfill the terms of its written contract with appellant and as a result thereof the latter was compelled to deduct ₱17,500.00 from the price agreed to be paid for the cargo by the Shanghai lumber firm and for which sum as damages appellant prayed judgment against appellee. (p. 14 motion to dismiss.)

There was nothing speculative about the amount of the counterclaim as it was the subject of a stipulation in open Court.

(p. 15 motion to dismiss.)

In its original decision the Supreme Court not only disallowed appellant's counterclaim of ₱17,500.00 with interest but held the latter accountable to the alleged joint account enterprise for this ₱17,500.00 which it had failed to receive from the Shanghai lumber firm due to the non fulfillment by appellee of its written contract with appellant. This decision would

have resulted in a double loss to appellant on account of the item of ₱17,500.00 which had been deducted from the price stipulated to be paid for the cargo by the Shanghai firm to appellant. In its modified decision reducing the judgment against appellant by ₱8,750.00, that is one-half of the item of ₱17,500.00, appellant was relieved from accounting to the joint account enterprise for alleged assets never realized, but was still denied any relief on account of its counterclaim for the ₱17,500 with interest lost by reason of appellee's failure to comply with its written contract of sale. It is therefore indisputable that appellant was allowed nothing on account of its counterclaim and that the entire amount thereof with interest, in addition to the amount of the judgment in accordance with the modified decision against appellant aggregating more than $25,000.00 U. S. Currency, was still in controversy on the date of that judgment.

In support of our contention that the amount of the counterclaim should be added to the amount of the judgment against appellant to make up the jurisdictional amount, we cite the following cases:

Block v. Darling, 35 L. ed. (U. S.) 476;

Harten v. Loffler, 53 L. ed. (U. S.) 568;

Buckstaff v. Russell & Co., 38 L. ed. (U. S.) 292.

Dushane v. Benedict, 30 L. ed. (U. S.) 810.

The only remaining point for determination is as to the right to add interest to the amount of the counterclaim up to the date of the judgment appealed from, in order to complete the jurisdictional amount. There could be less excuse for discussion on this point had the counterclaim contained a specific prayer for interest. The prayer of the counterclaim is for "₱17,500.00 with costs of suit and for such other and further relief as may be just and equitable." There can be no serious controversy as to the right of appellant to recover interest under this general prayer from the date of filing the counterclaim.

> "As a general rule, under the Codes, the complainant may ask for general relief as was ordinarily done in equity, and where such a prayer is made, the Court may grant any relief to which the complainant is entitled upon the allegations of the complaint and the proofs introduced at the trial."
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> 31 Cyc 111.
>
> "Interest allowed to a defendant upon a counterclaim should be computed from the date of the answer."
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> Linsangan v. Linsangan, 11 Ph. Rep., 521.
>
> Arts. 1100 and 1108 Civil Code; Gutierrez Hermanos v. Fuentebella, 13 Ph. Reps. 74.

Furthermore if the Supreme Court of the Philippines had sustained appellant's conten-

tion it would have had no option but to allow interest on the amount of the counterclaim from the date of the judgment of the trial Court under Section 510 of the Code of Civil Procedure of the Philippines which provides:

> "*Interest on Judgment Affirmed.*—When the Supreme Court shall affirm a judgment of a court below, for the recovery of money, *or shall reverse a judgment of a court below, and award a sum of money as debt or damages, it shall direct that interest be added to the original judgment or sum determined to be due, from the date of the former judgment until the date of the final judgment,* at the rate of six per cent per annum." (Italics ours.)

As a matter of law, the judgment, had it been favorable to appellant, would have included interest from the date of filing the answer but so far as the interest from the date of the judgment of the trial court is concerned, the provision above quoted is mandatory as to the inclusion thereof in the amount found due and this provision is in no manner dependent upon the form of the prayer for relief.

In the case of Massachusetts Benefit Association v. Miles, 37 L. ed., (U. S.) 834, this Honorable Court expressly held that a similar statute of Pennsylvania requiring interest to be added to the amount of a verdict as in the case of a judgment from its date, whether by the court of original jurisdiction or by the Supreme Court, was the determining factor con-

ferring jurisdiction upon this Court and declared such interest properly added in order to complete the requisite amount to confer such jurisdiction.

> 34 L. ed. (U. S.) 835; see also Ho'den v. Freedman's Saving & T. Co., 100 U. S. 72 (25 L. ed. 567) and Ohio v. Frank, 103 U. S. 697 (26 L. ed. 531) holding that the question of interest is always one of local law.

As we understand the decisions of this Honorable Court, there is no conflict as to the general rule that where interest antecedent to the judgment appealed from is or must be included in such judgment, and the amount, with the added interest, exceeds the necessary amount, jurisdiction will attach.

> The Patapsco v. Boyce, 20 L. ed. (U. S.) 457;
>
> The Rio Grande v. Otis, 22 L. ed. (U. S.) 60;
>
> Zeckendorf v. Johnson, 123 U. S. 617; 31 L. ed. 277, 278;
>
> Quebec Steamship Co. v. Merchant, 33 L. ed. (U. S.) 656;
>
> Bank of the U. S. v. Daniel et al. 12 Pet 32; 9 L. ed. 989.

The rule that the jurisdiction of this Court depends upon the amount of the judgment exclusive of interest thereon refers to interest

accruing after the judgment appealed from, that accruing before judgment being properly included.

New York Elevated R. Co. v. Fifth National Bank, 118 U. S. 608; 30 L. ed. 259.

We also understand that the defendant, in respect to his counterclaim is on equal footing with the plaintiff as to his complaint with reference to the right of appeal or in other words that the defendant in so far as his counterclaim is concerned is the complainant and the plaintiff the defendant.

If a complainant sues his adversary in the Philippines for a sum less than $25,000.00, U. S. currency, and is defeated successively by judgments of the Court of First Instance and of the Supreme Court, and if interest calculated on the amount of his claim between the dates of the two judgments is sufficient to increase it to a sum in excess of $25,000.00, U. S. currency, applying Sec. 510 of the Code of Civil Procedure in the light of the decision in the case of Massachusetts Benefit Association v. Miles (supra) it would seem indisputable that the amount in controversy on the date of such adverse decision of the Supreme Court of the Philippines would include such interest because by mandate of the local statute it must be included in the event of a favorable judgment and such a complainant would therefore have the right of appeal to this court. Inasmuch as the same local statute and the

same rule applies to counterclaims, it must be admitted that the amount in dispute in respect to appellant's counterclaim on the date of the judgment of the Supreme Court was at least $9,896.25, U. S. currency, which, added to the judgment against appellant amounting to $15,875.92, made the total amount in dispute in excess of $25,000.00, U. S. currency.

In view of the fact that by mandate of the local statute the amount demanded in every complaint or counterclaim, when sustained by the Supreme Court of the Islands, carries with it interest from the date of the judgment of the trial court, whether favorable or unfavorable to the demandant, it is difficult to conceive how the interest can be separated from the principal sum demanded in arriving at the amount in dispute by any reasonable interpretation of the language "value in controversy" employed in the Act of Congress of July 1st, 1902.

If this Honorable Court should reverse the Supreme Court of the Philippines as to the judgment in favor of appellee and should sustain appellant's counterclaim. the case would be remanded with instructions to enter judgment in favor of appellant for the amount demanded in the counterclaim, which, by virtue of the provision of Sec. 510 of the Code of Civil Procedure would necessarily include interest not only from the date of the adverse judgment of the Court of First Instance to that of the adverse judgment of the Supreme Court of the Islands from which this appeal is

prosecuted but also until the date of the final judgment in favor of appellant which might be ordered by this Court. This seems to us a conclusive test of the "value in controversy" under appellant's counterclaim on the date of the judgment appealed from.

The law requiring the interest to be included in every judgment of the Supreme Court such interest is as directly in dispute as the principal sum demanded, and such interest being directly in dispute it would be a contradiction of terms to say it forms no part of the "value in controversy."

The decisions of this Honorable Court involving cases where interest on the principal sum demanded in the complaint or counterclaim may be added or not according to the discretion of the appellate tribunal, would seem to have no application to cases where the local statute requires such interest to be added and thereby makes it an absolutely definite and certain part of the amount directly in controversy.

The facts supporting our contention as to the amount in controversy appear on the face of the pleadings and judgments and therefore if our conclusions therefrom are correct there is no room for discussion as to the preponderance of evidence establishing the value in controversy.

Anent the epithet "defrauder" with which counsel for appellee see fit to designate appellant, no doubt with the hope that the court may be

unconsciously prejudiced against the latter in resolving this motion, a digression may be pardoned to the extent of stating that the only proof offered in support of this oral joint account agreement was the testimony of the vice-president of appellee as to an alleged conversation had in Manila between him and the manager of appellant previous to the latter's departure for Shanghai, to the effect that if he (appellant's manager) succeeded in securing any orders for lumber in China they should be filled by appellee on joint account. There was no pretense of any stipulation in this conversation as to prices, quantity, time of delivery or any other terms which would have been indispensable to have made the alleged oral joint account agreement binding upon appellee had it seen fit to repudiate it. At that time no logs or lumber had been sold or contracted in China. (See pp. 143, 144, 162, 163, original typewritten record.)

Moreover, the alleged oral joint account agreement was evidenced by no written memorandum and, under the provisions of Art. 240 of the Commercial Code in connection with Art. 51 of the same code, could not be legally established by the testimony of witnesses without corroborating written evidence, or, in other words, was within the statute of frauds. But accepting as true the interested statement of appellee's vice-president, his conversation with appellant's manager amounted, at most, to nothing more than mere talk of possible future

trade entirely in prospective and which no sensible business man could have considered as legally binding upon anyone. Long after the alleged conversation appellant, by its own efforts and at its own expense, succeeded in securing an order for a cargo of logs to be used in the construction of a mausoleum for the deceased Emperor of China at an extraordinary price. Appellant could have sub-let the contract to any one of a dozen different concerns on equally as favorable terms as those agreed upon with appellee, which were on the basis of the market value of the logs.

According to appellee and the court, appellant's fraud consisted in misrepresentations of its manager as to the price he was receiving from his customer in China for the logs, a business secret, which, had he divulged would have deprived his company of the legitimate profits of a fortunate sale and would have properly led to his own dismissal from its service. It was none of appellee's business how much appellant was receiving for the cargo, unless a binding joint account agreement had been previously perfected. Such is the basis for dubbing appellant "the defrauder" and such was the basis for the judgment appealed from.

It is true that it was concurred in by the necessary majority of the members of the Supreme Court but it is difficult for us to believe that they fully informed themselves as to either the evidence or the law applicable thereto because in our opinion the judgment violates

the most elementary principles of contracts and of evidence. In this opinion we believe Justice Moreland is in accord with us.

For the reasons stated appellant respectfully asks that appellee's motion to dismiss be denied.

ALLISON D. GIBBS,
Attorney of record for appellant,
Manila, P. I.

Received copies of the foregoing argument this.....day of February, 1915.

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By

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Attorney of record for appellee.